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IN THE

Supreme Court of the United States

J.E.M. AG SUPPLY, INC., (doing business as Farm Advantage, Inc.), FARM ADVANTAGE, INC., LARRY BENZ, MERLE PRUETT, KEVIN WOLSWINKEL, TIM KAMSTRA and TOM EISCHEN SEED & CHEMICALS,

Petitioners,

v.

PIONEER HI-BRED INTERNATIONAL, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Are patents issued under 35 U.S.C. § 101 granting the right to exclude others from sexually reproducing plants or plant varieties, or from selling or using plants or plant varieties reproduced by means of sexual reproduction (*i.e.*, by seed), invalid because the Plant Variety Protection Act of 1970, 7 U.S.C. § 2321, *et seq.*, and the Plant Patent Act of 1930, 35 U.S.C. § 161-164, are the exclusive means of obtaining a federal statutory right to exclude others from reproducing, selling, or using plants or plant varieties?

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STATEMENT OF INTEREST

The American Bar Association ("ABA"), with more than 400,000 members, is the leading national membership organization of the legal profession. Its members come from each of the fifty states, the District of Columbia and the U.S. territories. Membership is voluntary and includes attorneys in private practice, government service, corporate law departments and public interest organizations, as well as legislators, law professors, law students, and non-lawyer associates in related fields.[1] The ABA supports a strong patent system, recognizing the important incentives it provides for technological progress. The on going activities of the ABA's Section of Intellectual Property Law are specifically directed to this purpose. As such, the ABA is deeply concerned that critical patent protection continue to be provided for certain categories of inventions made in plants.

After the Court's recent order granting review in this case, the ABA Board of Governors adopted the following resolution as ABA policy:

> RESOLVED, that the American Bar Association favors in principle the patentability of (1) plants and seeds and (2) essentially biological processes for the production of the same plants or seeds under 35 U.S.C. § 101 notwithstanding the protection of plants provided under

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[1] This brief is filed with the consent of both Petitioners and Respondent. *Amicus Curiae*, ABA, states that this brief has not been authored in whole or in part by counsel for a party and that no person or entity, other than *Amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption of or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

the Plant Patent Act of 1930 (35 U.S.C. §§ 161-164) and the Plant Variety Protection Act (7 U.S.C. § 2321 *et seq.*).

This brief is submitted in accordance with this policy and to assist in securing implementation of the principle that it supports.

SUMMARY OF ARGUMENT

Living matter, including plants, was long thought not to be patentable subject matter under the broad terms of 35 U.S.C. § 101 (1994) and its predecessor statutes. In *Diamond v. Chakrabarty*, 447 U.S. 303 (1980), however, this Court held that there is no prohibition against the patenting of living matter. The United States Patent & Trademark Office ("PTO") began to issue patents for plants under § 101 soon after the *Chakrabarty* decision. The Federal Circuit in the case below recently upheld this long unchallenged practice.

Petitioners now ask the Court to overturn the reasoned conclusion of both the PTO and the Federal Circuit and to hold that plants are not patentable under the broad provisions of 35 U.S.C. § 101. The PTO and the Federal Circuit have specialized competence—the former to examine and issue patents; the latter to adjudicate appeals arising under this country's patent laws. *See* 35 U.S.C. § 131 (Supp. V 1999); *see also* 28 U.S.C. §§ 1291, 1292(c)-(d), 1295 (1994 and Supp. V 1999). Petitioners maintain that two particular plant-specific statutes preclude the issuance of patents under § 101.

In support of their position, Petitioners put forward three arguments. First, under the canons of statutory construction, they argue that the subsequent and arguably more narrow provisions of the plant-specific acts should control and preempt the more general provisions of § 101. Second, they argue that the legislative histories of the plant-specific acts show a specific congressional intent to exclude plants from § 101. And third, they argue that allowing plant patents

under § 101 fatally conflicts with the roles of the plant-specific acts, creating what Petitioners call an impermissible "dual protection" scheme. All three arguments are wrong.

Petitioners' argument that the plant-specific acts preclude the issuance of patents under § 101 based on their purportedly narrower provisions conflicts with the fundamental principle that statutes are to be given their most harmonious, comprehensive meaning possible. Although more specific legislation can at times operate to limit earlier legislation, this outcome is highly disfavored and occurs only where the statutory schemes are repugnant to each other or where Congress has made its intention explicit. Neither condition is met here.

The legislative histories to the plant-specific acts do not exhibit a specific congressional intent to preclude plant protection under § 101. Rather, the cited legislative materials merely reiterate the then-common view that living subject matter, including plants, was not patentable at all—the very view rejected in *Chakrabarty*. Perhaps more important, the most recent amendments to the patent code evidence a clear understanding on the part of Congress that plants are patentable under § 101. Thus, to the extent that reliance on legislative history is appropriate in this case, Congress's pre-*Chakrabarty* statements regarding the conventional wisdom about the patentability of plants cannot trump Congress's clear intent to facilitate the patenting of plants under § 101 as expressed in its most recent patent legislation.

Finally, there is no recognized legal principle that "dual protection" schemes cannot coexist. Indeed, it is clear that dual protection regimes do exist, and that the courts have upheld their co-existence. The cases relied upon by Petitioners to show the loss (or denial by a court) of protection where intellectual property regimes overlap do not demonstrate that overlapping regimes are impermissible, *per se*. Rather, these cases turn on the failure of the article in

question to meet the requirements of one particular intellectual property regime or another (*e.g.*, a loss of trade dress protection because the protected article did not meet the non-functionality requirement).

In short, the provisions of § 101 are broad, as articulated by Congress and as recognized by the Court in *Chakrabarty*. Thus, the baseline construction of § 101 must be that plants are patentable subject matter. Petitioners' arguments simply do not provide a compelling, alternative construction of the law or provide clear evidence of a contrary legislative intent. Moreover, in the 16 years since the PTO first began issuing patents for plants under § 101, Congress not only did not enact any restrictions on this practice, it amended the patent code to facilitate it. For all these reasons, Petitioners' request that the Court foreclose the patenting of plants under § 101 should be denied.

ARGUMENT

A. Background Regarding the Patentability of Plants

The sole issue in this case is whether plants are patentable under the general provisions of the patent code, 35 U.S.C. § 101 (1994), or whether protection for plants is strictly limited to the rights obtainable under the Plant Variety Protection Act of 1970, 7 U.S.C. §§ 2321-2582 (1994 and Supp. II 1996) and the Plant Patent Act of 1930, 35 U.S.C. §§ 161-164 (1994, Supp. IV 1998 and Supp. V 1999). The scope of patentable subject matter is broadly set forth in 35 U.S.C. § 101:

> [w]hoever invents or discovers any new or useful process, machine, manufacture or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

On its face, § 101 does not impose significant restrictions on the scope of patentable subject matter. Nor does § 101 contain an explicit prohibition against the patenting of plants.

Notwithstanding the broad language of § 101, and its virtually identical predecessor statutes (for example, the Act of Feb. 21, 1793, ch. 11, § 1, 1 Stat. 318, 319 and the Act of July 8, 1870, ch. 230, § 24, 16 Stat. 198, 201), for a long time practitioners generally considered plants to be unpatentable. The conventional wisdom at that time had two bases. First, it was generally considered that "products of nature" or living matter, such as plants and animals, were simply not within the scope of patentable subject matter. *See, e.g., Diamond v. Chakrabarty*, 447 U.S. 303, 311 (1980) (citing *Ex parte Latimer*, 1889 Dec. Comm'r Pat. 123). Second, it was thought that plants were not amenable to the written description requirement as set forth in the patent statute. *Id.* at 312 (citing congressional hearings); *see also* 35 U.S.C. § 112 ¶1 (1994) (requiring that the specification of a patent "contain a written description of the invention . . . [in] clear, concise and exact terms . . .").

In response to the then-prevailing view that plants were not patentable, Congress separately enacted plant-specific protection regimes for asexually and sexually reproduced plant varieties. *See* Plant Patent Act of 1930, 35 U.S.C. §§ 161-164 (1994, Supp. IV 1998 and Supp. V 1999) ("PPA") (protecting asexually reproduced plants); *see also* Plant Variety Protection Act of 1970, 7 U.S.C. §§ 2321-2582 (1994 and Supp. II 1996) ("PVPA") (protecting sexually reproduced plants).

Subsequent to enactment of the PVPA and the PPA, the Court rejected the argument that an invention could not be patentable simply because it was living. *See Chakrabarty*, 447 U.S. at 309-310 (holding that genetically engineered microorganisms are patentable subject matter under 35 U.S.C. § 101). The language of 35 U.S.C. § 101 encompasses plants,

as well as microorganisms. Petitioners apparently concede that the fact that plants are living organisms is not an impediment to patentability. *See* Petition for Writ of Certiorari, *J.E.M. Ag Supply Int'l, Inc. v. Pioneer Hi-Bred Int'l Inc.*, No. 99-1996 at 18.

In 1985, following the line of reasoning set forth in *Chakrabarty*, the PTO also concluded that plants are patentable subject matter under § 101. *See Ex parte Hibberd*, 227 U.S.P.Q. 443 (Bd. Pat. App. & Interf. 1985); *cf., Animal Legal Defense Fund v. Quigg*, 932 F.2d 920 (Fed. Cir. 1991) (upholding authority of Commissioner to issue notice and interpretative ruling stating that multicellular organisms, including animals, would be treated as patentable). The Federal Circuit's holding in the instant case reaffirmed the conclusion previously reached by the PTO in *Hibberd* that plant inventions were patentable under § 101.

As noted above, Petitioners do not appear to be contending that plants are unpatentable under § 101 by its terms alone or simply because plants are living matter.[2] Rather, Petitioners argue that Congress's passage of the PPA and the PVPA effectively removed plants from the scope of patentable subject matter under 35 U.S.C. § 101 and its predecessor statutes, notwithstanding the fact that these provisions contain no such specific exclusion. In support of their argument, Petitioners rely on three propositions: First, the plant-specific statutes are said to preempt the eligibility of plant inventions

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[2] As their only possible argument regarding the scope of § 101 *per se*, Petitioners state that "Jefferson's exclusion of 'plant' from the definition of things patentable was a conscious omission." *See* Brief for Petitioners at footnote 4. This assertion is unsubstantiated. Moreover, many things now considered patentable, such as microorganisms and business methods, might have been considered unpatentable in the eighteenth century. *See Chakrabarty*, 447 U.S. at 309-310; *State Street Bank & Trust Co. v. Signature Financial Group Inc.*, 149 F.3d 1368 (Fed. Cir. 1998) *cert. denied*, 525 U.S. 1093 (1999).

for patents under § 101. *See* Brief for Petitioners at 16. Second, they argue that the legislative histories of the PPA and the PVPA allegedly show a specific congressional intent to exclude plant inventions from eligibility for patents under § 101. *See* Brief for Petitioners at 28-43. And third, Petitioners claim that allowing plant patents under § 101 fatally conflicts with the roles of the PPA and the PVPA, impermissibly creating a "dual protection" scheme. *See* Brief for Petitioners at 43-49.

B. Canons of Statutory Construction Militate Against Excluding Plants from § 101

Petitioners take the general position that subsequent and arguably more narrow legislation preempts earlier legislation. *See* Brief for Petitioners at 16. This position is over-broad, however, and misstates the priorities relevant to statutory construction. As a baseline proposition, where federal statutes overlap, or where purportedly conflicting provisions are found in the same act, a court should give the statutes "the most harmonious, comprehensive meaning possible." *See Weinberger v. Hynson, Wescot & Dunning, Inc.*, 412 U.S. 609, 631 (1973); *see also United States v. Borden Co.*, 308 U.S. 188 (1939) ("the rule is to give effect to both [acts] if possible"). Also, in construing the scope of a federal statute, the acts of subsequent Congresses generally do not reliably inform the interpretation of earlier enacted statutes. *See, e.g., United States v. Price*, 361 U.S. 304, 313 (1960). Even partial repeal of a statute by implication is disfavored and should be avoided. *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017 (1984); *Borden*, 308 U.S. at 198.

As noted above, historically, the central impediment to issuing patents for plants pursuant to § 101 and its predecessor statutes had been the view that living matter, altered by humans or not, was unpatentable *per se* (*i.e.*, not patent eligible subject matter). Following *Chakrabarty*,

however, it is clear that this view is incorrect. *Chakrabarty*, 447 U.S. at 310 (noting that the applicant's "discovery is not nature's handiwork, but his own; accordingly it is patentable subject matter under § 101"). Thus, on first principles, plants that have been intentionally bred or modified are patentable subject matter under § 101.

Turning to the plant-specific acts, the texts of the PPA and the PVPA reveal no explicit provisions excluding plants from the scope of § 101. Rather, the PPA and the PVPA simply recite the affirmative rights and limitations granted under each act and the requirements for gaining their benefit. Thus, under the canons and cases cited above, the mere existence of the PPA and the PVPA does not weigh in favor of excluding plants *by implication* from the expansive terms of the earlier-enacted statutes governing the scope of patentable subject matter and that are now found in § 101.

In support of their argument, Petitioners rely on the Court's recent decision in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). *See* Brief for Petitioners at 14, 16. *Brown & Williamson* is readily distinguishable, however.

In *Brown & Williamson*, the Court ruled that the FDA overstepped its authority in attempting to regulate tobacco products based on the FDA's redefinition of nicotine as a "drug" and cigarettes as "drug delivery devices." *Id.* at 127-28, 160-61. A key factor in the Court's rejection of the FDA's assertion of authority over tobacco products was the clear conflict between the FDA's regulatory mission and Congress's separate legislation regulating the sale of tobacco products. *Id.* at 137. The Court also noted that Congress never explicitly conferred jurisdiction over tobacco on the FDA, despite several proposals to do so. *Id.* at 147-49. Neither of these factors applies here.

As noted by the Court in *Brown & Williamson*, under the FDA's regulatory mission, tobacco products would

necessarily be banned or removed from the market were the FDA to be granted jurisdiction. *Id.* at 137 (commenting that tobacco products cannot be "safe and effective"). Yet Congress's separate legislation specifically regulating tobacco products clearly intended that tobacco products would remain on the market. *Id.* Because these regimes were irreconcilable, *i.e.*, tobacco products cannot simultaneously be removed from the market and continue to be sold, the Court concluded that recognizing FDA jurisdiction over tobacco would conflict with the clear intent on the part of Congress that tobacco products remain on the market. *Id.* at 143.

In the present case, the conflict of diametrically opposed legislative aims found in *Brown & Williamson* does not exist. As discussed in more detail below, the rights conferred by a "utility" patent under § 101, a plant patent under the PPA and a certificate under the PVPA are similar, though not identical. Thus, an inventor could comply with the requirements of one or more of the regimes and hold rights accordingly. The fact that the rights accorded by each statutory provision are different simply reflects the differing requirements for each regime. Indeed, as a general proposition, and assuming that one has complied with all of the relevant requirements of each intellectual property regime, overlapping intellectual property rights are neither novel nor evidence of conflicting legislative intent. *See, e.g.*, *Kohler Co. v. Moen Inc.*, 12 F.3d 632, 638-39, 643 (7th Cir. 1993) (rejecting argument that existence of design patent protection barred trademark protection for product design). Consequently, an overlap between a plant utility patent under § 101 and either a plant patent under the PPA or a plant certificate under the PVPA cannot be considered to be a "conflict."

The *Brown & Williamson* decision was also based on clear evidence that Congress had repeatedly rejected bills that would have conferred jurisdiction over tobacco on the FDA.

See Brown & Williamson, 529 U.S. at 147-49. Again, the analogous circumstance is not present in this case.[3] As will be discussed below, Congress recently passed patent legislation amending 35 U.S.C. § 119(f) with the clear intent to facilitate the PTO's issuance of utility patents for plant inventions under § 101.

In short, the *Brown & Williamson* decision does not stand for the unqualified proposition that subsequent, narrower legislation preempts preceding, broader legislation. In the other cases cited by Petitioners, either the legislative schemes in question had direct and irreconcilable conflicts, such as in *Brown & Williamson*, or the legislative history of the subsequent act made it clear that Congress intended to preempt the earlier legislation. *See, e.g., United States v. Estate of Romani*, 523 U.S. 517, 532-34 (1998) (noting inconsistencies between statutes at issue and frustration of congressional intent); *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 224-25 (1957) (noting that legislative history of predecessor patent venue statute showed that Congress intended statute to be sole basis for venue in patent infringement litigation). Because irreconcilable conflicts among the statutes in this case do not exist, and because there is no explicit indication that Congress intended the PVPA or the PPA to preempt § 101, one cannot conclude § 101 does not encompass plant inventions simply because other regimes are available.

C. Congress's Amendments to the Patent Statutes Show an Intent to Include Plants within the Scope of § 101

Petitioners assert that the legislative histories of the PPA and the PVPA demonstrate that Congress specifically sought

[3] *Brown & Williamson* also did not involve an administrative agency's response to significant reinterpretation of its governing statute, such as occurred after the *Chakrabarty* decision and which ultimately led the PTO to determine that plants were patentable subject matter under § 101.

to exclude plants from general § 101-based patentability. *See* Brief for Petitioners at 37, 43. The relevant legislative histories do not support Petitioners' claim, however. Rather, the statements relied upon by Petitioners merely reiterate the then-prevailing belief that plants, as with other living subject matter, could not satisfy the various statutory requirements for patentability.

For example, Petitioners quote the House Report accompanying passage of the PVPA at length. *See* Petitioner's Brief at 40. Yet the House Report merely reiterates the conventional wisdom that "[u]nder patent law, protection is *presently* limited to those varieties of plants which reproduce asexually [*i.e.*, under the PPA] . . . . No protection is available to those varieties of plants which reproduce sexually . . . ." *See* H.R. Rep. 91-1605 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5082, 5083 (emphasis added). Similarly, the Senate Judiciary Committee comments cited by Petitioners acknowledge the same point but also go on to state that the PVPA "does *not* alter protection currently available within the patent system." *See* Brief for Petitioners at 40-41 (quoting Senate Judiciary Committee's Report No. 91-1246 (1970)) (emphasis added). These statements, when taken in their historical context, simply do not demonstrate a specific congressional intent to affirmatively exclude plants from § 101. Congress's statements regarding the lack of general patent protection for plants only reflect the then-common view that living matter was not patentable under § 101. The *Chakrabarty* decision rejected this view, however.[4]

[4] "There is consensus that simultaneous protection is available for plant cultivars that are both certifiable under the PVPA and patentable under U.S. utility patent statutes." Sidney B. Williams, Jr. and Kenneth A. Weber, *Intellectual Property Protection and Plants, in Intellectual Property Rights Associated with Plants*, ASA Special Publication Number 52:91-107 (1989).

Given the prevailing views at the time of their enactment, the PPA and the PVPA should be considered as remedial statutes as opposed to specific legislation that is hostile to the broad scope of § 101. In any event, statements in Committee reports offered in support of remedial legislation cannot and do not amount to specific repeal or preemption of previously enacted statutes.

The only legislative material that explicitly speaks to the patentability of plants under § 101 contradicts Petitioners' argument and demonstrates that Congress understands and intends that § 101 encompasses plant inventions. Specifically, 35 U.S.C. § 119(f) (Supp. V 1999) was amended in 1999 to permit applicants for patents for plant inventions under § 101 ("utility patents") to claim priority to plant breeder's rights obtained in certain foreign countries. The relevant legislative history states that § 119 was amended because, under the prior law, patent applicants were "unable to base a priority claim on a foreign application for a plant breeder's right when seeking plant or utility patent protection for a plant variety in this country." *See*, Intellectual Property and Communications Omnibus Reform Act of 1999, H. R. Conf. Rep. No. 106-464, § 4802 at 145-146 (1999) (App. A at 15a). Thus, Congress clearly amended § 119 to *facilitate* the patenting of plant inventions under § 101.

Although Petitioners rely heavily on inferences drawn from the legislative histories of the PVPA and the PPA, they dismiss the relevance of the recent amendment to § 119(f). Petitioners liken this amendment to an "isolated amendment tacked on the end of a lengthy, multi-subject revenue bill." *See* Brief for Petitioners at 26. This analogy is incorrect.[5]

[5] Petitioners apparently have looked only to the Consolidated Appropriations Act of 2000, Pub. L. 106-113, Nov. 29, 1999, 113 Stat. 1501A-589, § 4802, and did not review the actual legislative history for the amendment to § 119(f) found in the Conference Report cited above.

As noted above, the amendment of § 119(f) represents substantive legislation with the defined objective of facilitating the very thing that Petitioners seek to foreclose-patents for plant inventions under § 101. Furthermore, the amendment of § 119(f) was part of a larger reform act entitled "Intellectual Property and Communications Omnibus Reform Act of 1999." Thus, Petitioners are incorrect when they characterize this Act as merely a "revenue bill."

Petitioners are essentially asking the Court to deny patent coverage under § 101 to plant inventions on the theory that enactment of the PPA and PVPA implicitly excluded such inventions from the scope of § 101. One cannot accept this argument, however, without thwarting the clear intention of Congress to the contrary, as set forth in its most recent (and only explicit) comment on the issue.

D. Plant Patents under the PPA and Certificates under the PVPA do not Conflict with Plant Utility Patents Under § 101

Petitioners argue that permitting patents for plant inventions under § 101 while also allowing protection under the plant-specific acts would result in a conflict in the laws due to an impermissible "dual protection" of the same invention. *See* Brief for Petitioners at 43. This position is not shared by the PTO (which issued the patents in suit), by Congress (as is clear from the legislative history of the recent amendments to § 119(f) (Supp. V 1999)), or by the U.S. Department of Agriculture (which issues PVPA certificates).[6]

Neither party has brought this important legislative history to the Court's attention.

[6] The web site of the Plant Variety Protection Office (of the U.S.D.A.) states that "a plant variety can also receive double protection under a utility patent and plant variety protection." (App. B at 23a; *http://www.ams.usda.gov/science/pvpo/pvp.htm*, General Information, "How is protection of the variety enforced.")

Petitioners argue that impermissible dual protection conflicts arise where "each federal statute purports to protect the same commercially valuable attribute(s) of a thing." *Id.* at 44-45. Notably, no direct legal authority is presented in support of this argument. Moreover, settled precedent establishes that "dual protection" can and does exist.

As a matter of legal construction, the PVPA, the PPA and the utility patent statutes are drawn to achieve different, though somewhat similar, ends. Consequently, there are some things that are protectable in one regime that are not protectable in another. In other words, these statutes do not protect the same commercially valuable attributes.

For example, the PVPA provides limited exclusive rights to the breeder of any sexually reproduced or tuber propagated plant varieties that are new, distinct, uniform and stable. *See* 7 U.S.C. § 2402 (1994 and Supp. II 1996). The limitation of PVPA certificates to plant *varieties* does not cover the much broader class of all sexually reproduced and/or tuber propagated plants. *See* 7 U.S.C. § 2401 (1994) (defining plant variety). PVPA certificates are generally easier to obtain than utility patents because the relevant statutory requirements and agency review processes are less rigorous. Also, a PVPA certificate provides less protection to the inventor than would a § 101 patent, for example, because the certificates permit both a crop planting exemption (usually called a farmer's exception) and a research exemption. *See* 7 U.S.C. §§ 2541(d)-(e), 2543, 2544 (1994). PVPA certificates also need only describe the plant as completely as is "reasonably necessary" under 7 U.S.C. § 2422 (1994), a standard that is considered to be lower than that required for utility patents under 35 U.S.C. § 112 ¶1 (1994). The PVPA does not reach non-sexually reproduced, non-tuber propagated plants. *See* 7 U.S.C. § 2402 (1994 and Supp. II 1996).

A plant patent under § 161 of the PPA is available to whoever invents, or discovers and asexually reproduces, any distinct and new variety of plant. *See* 35 U.S.C. § 161 (1994) (excluding tuber-propagated plants or plants found in an uncultivated state). Unlike the more rigorous description requirements necessary to obtain a utility patent, the description of a plant under the PPA (like that required for PVPA certificates) needs to be only as complete as is reasonably possible. *See* 35 U.S.C. § 162 (1994). The enforceable rights under a PPA patent are relatively narrow. First, the "right to exclude" only applies to asexual, as opposed to sexual production, of plants. *See* 35 U.S.C. § 163 (1994 and Supp. IV 1998). Second, the right to exclude is strictly limited to reproduction from the very plant upon which the PPA patent was issued and its asexually reproduced progeny. *See Imazio Nursery, Inc. v. Dania Greenhouses*, 69 F.3d 1560 (Fed. Cir. 1995) (holding that PPA patents do not otherwise reach plants with the same essential characteristics as the patented plant).

To receive a utility patent on a plant invention under § 101, the plant invention must be new, useful and nonobvious. *See* 35 U.S.C. §§ 101-103 (1994, Supp. I 1995 and Supp. V 1999). Utility patents are not limited to plant varieties or to any particular plant reproductive process, have no farmer's exemption and no research exemption for the development of new cultivars. The scope of protection accorded by a utility patent is, therefore, *broader* than that accorded by PVPA certificates or plant patents. Thus, contrary to Petitioners' argument, utility patents, PPA patents and PVPA certificates have different requirements to obtain benefit of their respective protections and provide different rights against infringers.

Petitioners' "impermissible dual protection" argument is also in conflict with the settled law regarding overlapping intellectual property regimes. Specifically, it is commonplace

for the same item to be subject to multiple protection schemes. For example, copyright and design patent protection can all be applied to the same ornamental object. *See, e.g., Kohler Co. v. Moen Inc.*, 12 F.3d 632, 638-39 (7th Cir. 1993) (rejecting argument that trademark and design patent protection are incompatible); *Pioneer Hi-Bred Int'l, Inc. v. J.E.M. Ag Supply, Inc.*, 200 F.3d 1374, 1378 (Fed. Cir. 2000) (Pet. App. at 9) (noting that copyright and design patent protection are available for same ornamental object) *cert. granted*, 121 S.Ct. 1077 (U.S. Feb. 20, 2001); *see also Mazer v. Stein*, 347 U.S. 201, 215-218 (1954) (rejecting argument that existence of design patent protection precluded copyright protection for lamps fashioned from statuettes). Similarly, overlapping mask work and utility patent protection are available for semiconductor chip designs. *See, e.g., Brooktree Corp. v. Advanced Micro Devices, Inc.*, 977 F.2d 1555, 1562-63 (Fed. Cir. 1993). Of course, as with the plant protection schemes discussed above, the particular requirements for each regime vary, as do the accorded rights. The mere existence of multiple regimes does not present an impermissible conflict, however, because the patent or certificate holder is always limited to the specific rights available through compliance with the different protection schemes.

Petitioners also rely on the Court's recent decision in *Traffix Devices, Inc. v. Marketing Displays, Inc.*, 121 S.Ct. 1255 (U.S. March 20, 2001). *Traffix* did not turn on the issue of whether "dual protection" schemes were permissible or not. Rather, in *Traffix*, the Court held that trade dress protection, which can only cover non-functional subject matter, was unavailable where the article in question was clearly functional. *Id.* at 1263. As evidence that the article was functional, the Court noted that the same article was covered by a utility patent, which by explicit statutory requirements can only be granted for *useful* inventions. *Id.* at 1260-61. In other words, because the article in question met

the utility requirement for patentability, it could not simultaneously be non-functional as required for eligibility for trade dress protection. *Id.* at 1263 (but not resolving whether rule would be *per se*).

Nothing in the Court's decision in *Traffix* supports Petitioners' theory that the statutory requirements of § 101 must be construed in a manner to prevent the potential for overlap with the PPA and the PVPA. A logical inability to simultaneously meet the statutory requirements for two specific intellectual property protection regimes in a particular trade dress case is not the same thing as a fatal conflict between all possible dual protection regimes. *Traffix* does not suggest, for example, that trade dress protection and design patent protection are irreconcilable or that one cannot possess rights under both regimes.

Petitioners also rely upon the appellate decision in *Ropat Corp. v. McGraw-Edison Co.*, 535 F.2d 378 (7th Cir. 1976). In *Ropat*, the court of appeals held that a design patent was invalid under the judicially-created rule against double patenting in light of an earlier filed utility patent covering the same invention. *Id.* at 380, 383. Clearly, *Ropat* does not support the broad proposition that design patents and utility patents under § 101 cannot be issued on the same device. *Id.* at 381 ("The patent laws, of course, provide that a design patent and a utility patent may well be issued on the same construction."). In any event, the possibility of obviating double patenting with a terminal disclaimer (*i.e.*, waiving all patent term coverage for the later issued patent that extends beyond the expiration date of the first patent) further shows that the limitations of double patenting do not mandate that dual protection schemes cannot exist. Indeed, the court in *Ropat* specifically noted that the patentee had failed to obtain a terminal disclaimer. *Id.* at 379 n.1. The reasonable conclusion to be drawn from *Ropat* is that dual protection regimes

can exist, although the patent term of those rights may be limited by the particular requirements of the patent system.

The principle underlying Petitioners' dual protection argument, if adopted by the Court, will have significant adverse effects in several areas of intellectual property law that were long thought settled. Specifically, any intellectual property right owner with overlapping coverage under more than one regime will have to consider the risk that those rights will be challenged in a manner similar to the attack currently leveled by Petitioners. Thus, Petitioners' dual protection attack not only subverts the express will of Congress regarding the patent system, it would also create legal uncertainty in almost all areas of intellectual property law where overlapping rights have previously existed. This approach is at odds with the current legal practice of permitting overlapping property rights.

CONCLUSION

The judgment of the Federal Circuit should be affirmed.

Respectfully submitted,

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APPENDICES

APPENDIX A

HOUSE OF REPRESENTATIVES

106TH CONGRESS
1st Session

Report
106-464

INTELLECTUAL PROPERTY AND COMMUNICATIONS OMNIBUS REFORM ACT OF 1999

NOVEMBER 9, 1999.—Ordered to be printed

Mr. TAUZIN, from the committee of conference, submitted the following

CONFERENCE REPORT

(To accompany H.R. 1554]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 1554), to amend the provisions of title 17, United States Code, and the Communications Act of 1934, relating to copyright licensing and carriage of broadcast signals by satellite, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment, insert the following:

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Intellectual Property and Communications Omnibus Reform Act of 1999".

(b) TABLE OF CONTENTS.—The table of contents of this Act is as follows:

Sec. 1. Short title; table of contents.

TITLE I—SATELLITE HOME VIEWER IMPROVEMENT

Sec. 1001. Short title.
Sec. 1002. Limitations an exclusive rights; secondary transmissions by satellite carriers within local markets.
Sec. 1003. Extension of effect of amendments to section 119 of title 17, United States Code.
Sec. 1004. Computation of royalty fees for satellite carriers.
Sec. 1005. Distant signal eligibility far consumers.
Sec. 1006. Public broadcasting service satellite feed.
Sec. 1007. Application of Federal communications commission regulations.
Sec. 1008. Rules for satellite carriers retransmitting television broadcast signals.

Sec. 1009. Retransmission consent.
Sec. 1010. Severability.
Sec. 1011. Technical amendments.
Sec. 1012. Effective dates.

TITLE II—RURAL LOCAL TELEVISION SIGNALS

Sec. 2001. Short title.
Sec. 2002. Loan guarantees.
Sec. 2003. Administration of loan guarantees.
Sec. 2004. Retransmission of local television broadcast stations.
Sec. 2005. Local television service in unserved and underserved markets.
Sec. 2006. Definitions.

TITLE III—TRADEMARK CYBERPIRACY PREVENTION

Sec. 3001. Short title; references.
Sec. 3002. Cyberpiracy prevention.
Sec. 3003. Damages and remedies.
Sec. 3004. Limitation on liability.
Sec. 3005. Definitions.
Sec. 3006. Study on abusive domain name registrations involving personal names.
Sec. 3007. Historic preservation.
Sec. 3008. Savings clause.
Sec. 3009. Technical and conforming amendments.
Sec. 3010. Effective date.

TITLE IV—INVENTOR PROTECTION

Sec. 4001. Short title.

Subtitle A—Inventors' Rights

Sec. 4101. Short title.
Sec. 4102. Integrity in invention promotion services.
Sec. 4103. Effective date.

Subtitle B—Patent and Trademark Fee Fairness

Sec. 4201. Short title.
Sec. 4202. Adjustment of patent fees.
Sec. 4203. Adjustment of trademark fees.
Sec. 4204. Study on alternative fee structures.
Sec. 4205. Patent and Trademark Office Funding.
Sec. 4206. Effective date.

Subtitle C—First Inventor Defense

Sec. 4301. Short title.
Sec. 4302. Defense to patent infringement based on earlier inventor.
Sec. 4303. Effective date and applicability.

Subtitle D—Patent Term Guarantee

Sec. 4401. Short title.
Sec. 4402. Patent term guarantee authority.
Sec. 4403. Continued examination of patent applications.
Sec. 4404. Technical clarification.
Sec. 4405. Effective date.

Subtitle E—Domestic Publication of Patent Applications Published Abroad

Sec. 4501. Short title.
Sec. 4502. Publication.
Sec. 4503. Time for claiming benefit of earlier filing date.
Sec. 4504. Provisional rights.
Sec. 4505. Prior art effect of published applications.
Sec. 4506. Cost recovery for publication.
Sec. 4507. Conforming amendments.
Sec. 4508. Effective date.

Subtitle F—Optional Inter Partes Reexamination Procedure

Sec. 4601. Short title.
Sec. 4602. Ex parte reexamination of patents.

[Page 3]

Sec. 4603. Definitions.
Sec. 4604. Optional inter partes reexamination procedures.
Sec. 4605. Conforming amendments.
Sec. 4606. Report to Congress.
Sec. 4607. Estoppel effect of reexamination.
Sec. 4608. Effective date.

Subtitle G—Patent and Trademark Office

Sec. 4701. Short title.

CHAPTER 1—UNITED STATES PATENT AND TRADEMARK OFFICE

Sec. 4711. Establishment of Patent and Trademark Office.
Sec. 4712. Powers and duties.
Sec. 4713. Organization and management.
Sec. 4714. Public advisory committees.
Sec. 4715. Conforming amendments.
Sec. 4716. Trademark Trial and Appeal Board.
Sec. 4717. Board of Patent Appeals and Interferences.
Sec. 4718. Annual report of Director.
Sec. 4719. Suspension or exclusion from practice.
Sec. 4720. Pay of Director and Deputy Director.

CHAPTER 2—EFFECTIVE DATE; TECHNICAL AMENDMENTS

Sec. 4731. Effective date.
Sec. 4732. Technical and conforming amendments.

CHAPTER 3—MISCELLANEOUS PROVISIONS

Sec. 4741. References.
Sec. 4742. Exercise of authorities.
Sec. 4743. Savings provisions.
Sec. 4744. Transfer of assets.
Sec. 4745. Delegation and assignment.
Sec. 4746. Authority of director of the Office of Management and Budget with respect to functions transferred.
Sec. 4747. Certain vesting of functions considered transfers.
Sec. 4748. Availability of existing funds.
Sec. 4749. Definitions.

Subtitle H—Miscellaneous Patent Provisions

Sec. 4801. Provisional applications.
Sec. 4802. International applications.
Sec. 4803. Certain limitations on damages for patent infringement not applicable.

Sec. 4804. Electronic filing and publications.
Sec. 4805. Study and report on biological deposits in support of biotechnology patents.
Sec. 4806. Prior invention.
Sec. 4807. Prior art exclusion for certain commonly assigned patents.
Sec. 4808. Exchange of copies of patents with foreign countries.

TITLE V—MISCELLANEOUS PROVISIONS

Sec. 5001. Commission on online child protection.
Sec. 5002. Privacy protection for donors to public broadcasting entities.
Sec. 5003. Completion of biennial regulatory review.
Sec. 5004. Public broadcasting entities.
Sec. 5005. Technical amendments relating to vessel hull design protection.
Sec. 5006. Informal rulemaking of copyright determination.
Sec. 5007. Service of process for surety corporations.
Sec. 5008. Low-power television.

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[Pages 4 to 78 of Conference Report intentionally omitted.]

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SEC. 4746. AUTHORITY OF DIRECTOR OF THE OFFICE OF MANAGEMENT AND BUDGET WITH RESPECT TO FUNCTIONS TRANSFERRED.

(a) DETERMINATIONS.—If necessary, the Director of the Office of Management and Budget shall make any determination of the functions that are transferred under this subtitle.

(b) INCIDENTAL TRANSFERS.—The Director of the Office of Management and Budget, at such time or times as the

Director shall provide, may make such determinations as may be necessary with regard to the functions transferred by this subtitle, and to make such additional incidental dispositions of personnel, assets, liabilities grants contracts, property, records, and unexpended balances of appropriations, authorizations, allocations, and other funds held, used, arising from, available to, or to be made available in connection with such functions, as may be necessary to carry out the provisions of this subtitle. The Director shall provide for the termination of the affairs of all entities terminated by this subtitle and for such further measures and dispositions as may be necessary to effectuate the purposes of this subtitle.

SEC. 4747. CERTAIN VESTING OF FUNCTIONS CONSIDERED TRANSFERS.

For purposes of this subtitle, the vesting of a function in a department or office pursuant to reestablishment of an office shall be considered to be the transfer of the function.

SEC. 4748. AVAILABILITY OF EXISTING FUNDS.

Existing appropriations and funds available for the performance of functions, programs, and activities terminated pursuant to this subtitle shall remain available, for the duration of their period of availability, for necessary expenses in connection with the termination and resolution of such functions, programs, and activities, subject to the submission of a plan to the Committees on Appropriations of the House and Senate in accordance with the procedures set forth in section 605 of the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act 1999, as contained in Public Law 105-277.

SEC. 4749. DEFINITIONS.

For purposes of this subtitle—

(1) the term "function" includes any duty, obligation, power, authority, responsibility, right, privilege, activity, or program; and

(2) the term "office" includes any office, administration, agency, bureau, institute, council, unit, organizational entity or component thereof.

Subtitle H—Miscellaneous Patent Provisions

SEC. 4801. PROVISIONAL APPLICATIONS.

(a) ABANDONMENT.—Section 111(b)(5) of title 35 United States Code, is amended to read as follows:

"(5) ABANDONMENT.—Notwithstanding the absence of a claim, upon timely request and as prescribed by the Director, a [Page 80] *provisional application may be treated as an application filed under subsection (a). Subject to section 119(e)(3) of this title, if no such request is made, the provisional application shall be regarded as abandoned 12 months after the filing date of such application and shall not be subject to revival after such 12-month period.".*

(b) TECHNICAL AMENDMENT RELATING TO WEEKENDS AND HOLIDAYS.—Section 119(e) of title 35, United States Code, is amended by adding at the end the following:

"(3) If the day that is 12 months after the filing date of a provisional application falls on a Saturday, Sunday, or Federal holiday within the District of Columbia, the period of pendency of the provisional application shall be extended to the next succeeding secular or business day."

(c) ELIMINATION OF COPENDENCY REQUIREMENT.—Section 119(e)(2) of title 35, United States Code, is amended by striking "and the provisional application was pending on the filing date of the application for patent under section 111(a) or section 363 of this title".

(d) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of enactment of this Act and shall apply to any provisional application filed on or

after June 8, 1995, except that the amendments made by subsections (b) and (c) shall have no effect with respect to any patent which is the subject of litigation in an action commenced before such date of enactment.

SEC. 4802. INTERNATIONAL APPLICATIONS.

Section 119 of title 35, United States Code, is amended as follows:

(1) In subsection (a), insert "or in a WTO member country," after "or citizens of the United States,".

(2) At the end of section 119 add the following new sub-sections:

"(f) Applications for plant breeder's rights filed in a WTO member country (or in a foreign UPOV Contracting Party) shall have the same effect for the purpose of the right of priority under subsections (a) through (c) of this section as applications for patents, subject to the same conditions and requirements of this section as apply to applications for patents.

"(g) As used in this section—

"(1) the term 'WTO member country' has the same meaning as the term is defined in section 104(b)(2) of this title; and

"(2) the term 'UPOV Contracting Party' means a member of the International Convention for the Protection of New Varieties of Plants.".

SEC. 4803. CERTAIN LIMITATIONS ON DAMAGES FOR PATENT INFRINGEMENT NOT APPLICABLE.

Section 287(c)(4) of title 35, United States Code, is amended by striking "before the date of enactment of this subsection " and inserting "based on an application the earliest effective filing date of which is prior to September 30, 1996".

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SEC. 4804. ELECTRONIC FILING AND PUBLICATIONS.

(a) PRINTING OF PAPERS FILED.—Section 22 of title 35, United States Code, is amended by striking "printed or typewritten and inserting "printed, typewritten, or on an electronic medium".

(b) PUBLICATIONS.—Section 11(a) of title 35, United States Code, is amended by amending the matter preceding paragraph 1 to read as follows:

"(a) The Director may publish in printed, typewritten, or electronic form, the following:".

(c) COPIES OF PATENTS FOR PUBLIC LIBRARIES.—Section 13 of title 35, United States Code, is amended by striking "printed copies of specifications and drawings of patents" and inserting "copies of specifications and drawings of patents in printed or electronic form".

(d) MAINTENANCE OF COLLECTIONS.—

(1) ELECTRONIC COLLECTIONS.—Section 41(i)(1) of title 35, United States Code, is amended by striking "paper or microform" and inserting "paper, microform, or electronic".

(2) Continuation of maintenance.—The Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office shall not, pursuant to the amendment made by paragraph (1), cease to maintain, for use by the public, paper or microform collections of United States patents, foreign patent documents, and United States trademark registrations, except pursuant to notice and opportunity for public comment and except that the Director shall first submit a report to the Committees on the Judiciary of the Senate and the House of Representatives detailing such plan, including a description of the mechanisms in

place to ensure the integrity of such collections and the data contained therein, as well as to ensure prompt public access to the most current available information, and certifying that the implementation of such plan will not negatively impact the public.

SEC. 4805. STUDY AND REPORT ON BIOLOGICAL DEPOSITS IN SUPPORT OF BIOTECHNOLOGY PATENTS.

(a) IN GENERAL.—Not later than 6 months after the date of enactment of this Act, the Comptroller General of the United States, in consultation with the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office, shall conduct a study and submit a report to Congress on the potential risks to the United States biotechnology industry relating to biological deposits in support of biotechnology patents.

(b) CONTENTS.—The study conducted under this section shall include—

(1) an examination of the risk of export and the risk of transfers to third parties of biological deposits, and the risks posed by the change to 18-month publication requirements made by this subtitle;

(2) an analysis of comparative legal and regulatory regimes; and

(3) any related recommendations.

(c) CONSIDERATION OF REPORT.—In drafting regulations affecting biological deposits (including any modification of title 37, Code of Federal Regulations, section 1.801 et seq.), the United States Pat-[Page 82]*-ent and Trademark Office shall consider the recommendations of the study conducted under this section.*

SEC. 4806. PRIOR INVENTION.

Section 102(g) of title 35, United States Code, is amended to read as follows:

"(g)(1) during the course of an interference conducted under section 135 or section 291, another inventor involved therein establishes, to the extent permitted in section 104, that before such person's invention thereof the invention was made by such other inventor and not abandoned, suppressed, or concealed, or (2) before such person's invention thereof, the invention was made in this country by another inventor who had not abandoned, suppressed, or concealed it. In determining priority of invention under this subsection, there shall be considered not only the respective dates of conception and reduction to practice of the invention, but also the reasonable diligence of one who was first to conceive and last to reduce to practice, from a time prior to conception by the other.".

SEC. 4807. PRIOR ART EXCLUSION FOR CERTAIN COMMONLY ASSIGNED PATENTS.

(a) Prior Art Exclusion.—Section 103(c) of title 35, United States Code, is amended by striking "subsection (f) or (g)" and inserting "one or more of subsections (e), (f), and (g)".

(b) EFFECTIVE DATE.—The amendment made by this section shall apply to any application for patent filed on or after the date of enactment of this Act.

SEC. 4808. EXCHANGE OF COPIES OF PATENTS WITH FOREIGN COUNTRIES.

Section 12 of title 35, United States Code, is amended by adding at the end the following: "The Director shall not enter into an agreement to provide such copies of specifications and drawings of United States patents and applications to a foreign country, other than a NAFTA country or a WTO member country, without the express authorization of the Secretary of Commerce. For purposes of this section, the terms 'NAFTA country' and WTO member country' have the meanings given those terms in section 104(b).".

TITLE V—MISCELLANEOUS PROVISIONS

SEC. 5001. COMMISSION ON ONLINE CHILD PROTECTION.

(a) REFERENCES.—Wherever in this section an amendment is expressed in terms of an amendment to any provision, the reference shall be considered to be made to such provision of section 1405 of the Child Online Protection Act (47 U.S.C. 231 note).

(b) MEMBERSHIP.—Subsection (b) is amended—

(1) by striking paragraph (1) and inserting the following new paragraph:

"(1) INDUSTRY MEMBERS.—The Commission shall include 16 members who shall consist of representatives of—

"(A) providers of Internet filtering or blocking services or software;

"(B) Internet access services;

"(C) labeling or ratings services;

"(D) Internet portal or search services;

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[Pages 83 to 144 of Conference Report intentionally omitted]

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SUBTITLE H—MISCELLANEOUS PATENT PROVISIONS

Subtitle H consists of seven largely-unrelated provisions that make needed clarifying and technical changes to the Patent Act. Subtitle H also authorizes a study. The provisions in Subtitle H take effect on the date of enactment except where stated otherwise in certain sections.

Sec. 4801. Provisional applications

Section 4801 amends section 111(b)(5) of the Patent Act by permitting a provisional application to be converted into a non-provisional application. The applicant must make a request within 12 months after the filing date of the provisional application for it to be converted into a non-provisional application.

Section 4801 also amends section 119(e) of the Patent Act by clarifying the treatment of a provisional application when its last day of pendency falls on a weekend or a Federal holiday, and by eliminating the requirement that a provisional application must be co-pending with a non-provisional application if the provisional application is to be relied on in any USPTO proceeding.

Sec. 4802. International applications

Section 4802 amends section 119(a) of the Patent Act to permit persons who filed an application for patent first in a WTO [24] member country to claim the right of priority in a subsequent patent application filed in the United States, even if such country does not yet afford similar privileges on the basis of applications filed in the United States. This amendment was made in conformity with the requirements of Articles 1 and 2 of the TRIPS Agreement.[25] These Articles

[24] World Trade Organization. The agreement establishing the WTO is a multilateral instrument which creates a permanent organization to oversee the implementation of the Uruguay Round Agreements, including the GATT 1994. to provide a forum for multilateral trade negotiations and to administer dispute settlements (*see* note 3, *supra*). Staff of the House Comm. on Ways and Means, 104th cong., 1st Sess., Overview and Compilation of U.S. Trade Statutes 1040 (Comm. Print 1995) [hereinafter, Overview and Compilation of U.S. Trade Statutes].

[25] Trade-Related Aspects of Intellectual Property Rights Agreement; *i.e.*, that component of GATT which addresses intellectual property rights among the signatory members.

require that WTO member countries apply the substantive provisions of the Paris Convention for the Protection of Industrial Property to other WTO member countries. As some WTO member countries are not yet members of the Paris Convention and as developing countries are generally permitted periods of up to 5 years before complying with all provisions of the TRIPS Agreement, they are not required to extend the right of priority to other WTO member countries until such time.

Section 4802 also adds subsection (f) to section 119 of the Patent Act to provide for the right of priority in the United States on the basis of an application for a plant breeder's right first filed in a WTO member country or in a UPOV[26] Contracting Party. Many foreign countries provide only a sui generis system of protection for plant varieties. Because section 119 presently addresses only pat-[Page 146]-ents and inventors' certificates, applicants from those countries are technically unable to base a priority claim on a foreign application for a plant breeder's right when seeking plant patent or utility pat-exit protection for a plant variety in this country.

Subsection (g) is added to section 119 to define the terms "WTO member country" and "UPOV Contracting Party."

Sec. 4803. Certain limitations on remedies for patent infringement not applicable

Section 4803 amends section 287(c)(4) of the Patent Act, which pertains to certain limitations on remedies for patent

[26] International Convention for the Protection of New Varieties of Plants. UPOV is administered by the World Intellectual Property Organization (WIPO), which is charged with the administration of, and activities concerning revisions to, the international intellectual property treaties. UPOV has 40 members, and guarantees plant breeders national treatment and right of priority in other countries that are members of the treaty, along with certain other benefits. *See* MA. Leaffer, International Treaties on Intellectual Property at 47 (SNA, 2d ad. 1997).

infringement, to make it applicable only to applications filed on or after September 30, 1996.

Sec. 4804. Electronic filing and publications

Section 4804 amends section 22 of the Patent Act to clarify that the USPTO may receive, disseminate, and maintain information in electronic form. Subsection (d)(2), however, prohibits the Director from ceasing to maintain paper or microform collections of U.S. patents, foreign patent documents, and U.S. trademark registrations, except pursuant to notice and opportunity for public comment and except the Director shall first submit a report to Congress detailing any such plan, including a description of the mechanisms in place to ensure the integrity of such collections and the data contained therein, as well as to ensure prompt public access to the most current available information, and certifying that the implementation of such plan will not negatively impact the public.

In addition, in the operation of its information dissemination programs and as the sole source of patent data, the USPTO should implement procedures that assure that bulk patent data are provided in such a manner that subscribers have the data in a manner that grants a sufficient amount of time for such subscribers to make the data available through their own systems at the same time the USPTO makes the data publicly available through its own Internet system.

Sec. 4805. Study and report on biologic deposits in support of biotechnology patents

Section 4805 charges the Comptroller General, in consultation with the Director of the USPTO, with conducting a study and submitting a report to Congress no later than six months after the date of enactment on the potential risks to the U.S. biotechnological industry regarding biological deposits in support of biotechnology patents. The study shall include: an examination of the risk of export and of transfers to third parties of biological deposits, and the risks posed by

the 18-month publication requirement of subtitle E; an analysis of comparative legal and regulatory regimes; and any related recommendations. The USPTO is then charged with considering these recommendations when drafting regulations affecting biological deposits.

Sec. 4806. Prior invention

Section 4806 amends section 102(g) of the Patent Act to make clear that an inventor who is involved in a USPTO interference [page 147] proceeding and establishes a date of invention under section 104 is subject to the requirements of section 102(g), including the requirement that the invention was not abandoned, suppressed, or concealed.

Sec. 4807. Prior art exclusion for certain commonly assigned patents

Section 4807 amends section 103 of the Patent Act, which sets forth patentability conditions related to the nonobviousness of subject matter. Section 103(c) of the current statute states that subject matter developed by another person which qualifies as prior art only under section 102(f) or (g) shall not preclude granting a patent on an invention with only obvious differences where the subject matter and claimed invention were, at the time the invention was made, owned by the same person or subject to an obligation of assignment to the same person. The bill amends section 103(c) by adding a reference to section 102(e), which currently bars the granting of a patent if the invention was described in another patent granted on an application filed before the applicant's date of invention. The effect of the amendment is to allow an applicant to receive a patent when an invention with only obvious differences from the applicant's invention was described in a patent granted on an application filed before the applicant's invention, provided the inventions are commonly owned or subject to an obligation of assignment to the same person.

Sec. 4808. Exchange of copies of patents with foreign countries

Sec. 4808 amends section 12 of the Patent Act to prohibit the Director of the USPTO from entering into an agreement to exchange patent data with a foreign country that is not one of our NAFTA [27] or WTO trading partners, unless the Secretary of Commerce explicitly authorizes such an exchange.

TITLE V—MISCELLANEOUS PROVISIONS

Sec. 5001. Commission on Online Child Protection

Section 5001(a) provides that references contained in the amendments made by this title are to section 1405 of the Child On-line Protection Act (47 U.S.C. 231 note).

Section 5001(b) amends the membership of the Commission on Online Child Protection to remove a requirement that a specific number of representatives come from designated sectors of private industry, as outlined in the Act. Section 5001(b) also provides that the members appointed to the Commission as of October 31, 1999 shall remain as members. Section 5001(b) also prevents the members of the Commission from being paid for their work on the Commission. This provision, however, does not preclude members from being reimbursed for legitimate costs associated with participating in the Commission (such as travel expenses).

Section 5001(c) extends the due date for the report of the Commission by one year.

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[Pages 148 to 155 of Conference Report intentionally omitted.]

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[27] North American Free Trade Agreement, Pub. L. No. 103-182. The cornerstone of NAFTA is the phased-out elimination of all tariffs on trade between the U.S., Canada, and Mexico. Overview and Compilation of U.S. Trade Statutes 1999.

APPENDIX B

www.ams.usda.gov/science/pvpo/pvp/htm

AMS **Science and Technology Programs**

Plant Variety Protection Office

Mission

The Plant Variety Protection Office administers the Plant Variety Protection Act, by issuing Certificates of Protection in a timely manner. The Act provides legal intellectual property rights protection to developers of new varieties of plants which are sexually reproduced (by seed) or tuber-propagated.

General Information

- What is Plant Variety Protection? (PVP)
- Who may apply for PVP?
- How is protection obtained?
- What is the total cost of protection?
- What actions are people prohibited from taking with a protected variety?
- What exemptions are there to the protection provided?
- The Plant Variety Protection Act (PVPA)
- Application Requirements
- Forms and Instructions
- PVP Application/Certificate Status Database
- Contacts
- Other Links of Interest for PVPO Viewers
- PVPO News Release
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[6/11/2001 9:49 AM]

What is Plant Variety Protection (PVP)?

The Plant Variety Protection Act (PVPA), enacted in December of 1970, and amended in 1994, provides legal intellectual property rights protection, to developers of new varieties of plants that are sexually reproduced (by seed) or are tuber-propagated. Bacteria and fungi are excluded. The PVPA is administered by the United States Department of Agriculture.

A Certificate of Protection is awarded to an owner of a variety after an examination shows that it is new, distinct from other varieties, and genetically uniform and stable through successive generations.

The term of protection is 20 years for most crops and 25 years for trees, shrubs, and vines. The owner of a U.S. protected variety has exclusive rights to multiply and market the seed of that variety.

Who benefits from PVP?

The public benefits as the recipient of quality food, feed, fiber, and other products that result directly from improved plant varieties. Growers of food and ornamental, industrial, or medicinal crops benefit when higher quality varieties are available. Plant Variety Protection allows owners of new varieties to maintain control over the purity and the marketing of the variety. Such protection helps companies or individuals spending time and money developing a variety to obtain a return on their investment.

Who may apply for PVP?

Anyone who is the owner, breeder, developer, or discoverer of a unique cultivator of a sexually reproduced or tuber-propagated plant may apply for Plant Variety Protection. This applies to citizens of the United States, as well as citizens of countries that are members of the International Union for the Protection of New Varieties of Plants (UPOV). The applicant may be an individual, a public institution, or a corporation.

What if I've already sold seed of my variety but would still like to have it protected?

As long as you have not sold seed of the variety, offered or advertised it for sale for more than 1 year in the United States, prior to the date your application is filed in the Plant Variety Protection Office, your variety is still eligible for protection. You have more than one year of eligibility if the variety has only been sold in a foreign country. Ordinarily that time would be 4 years, and 6 years for a tree or vine.

How is protection obtained?

The Plant Variety Protection Office will provide application forms for protection of a plant variety with instructions on how to file applications. To obtain an Application by mail, please send an inquiry via the Webmaster, or mail written inquiries to:

Plant Variety Protection Office
National Agricultural Library, Room 500
10301 Baltimore Boulevard
Beltsville, MD 20705-2351

Phone: 301-504-5518
Fax: 301-504-5291
E-Mail: Webmaster. Plant Variety Protection Office

Please include a complete mailing address with all inquiries.

What is the total cost of protection?

The total cost of protection is $3,025. This price includes $2,705 for the application and examination; and the certificate fee of $320, upon issuance of the certificate. These fees are subject to change.

What protection do I obtain?

Without explicit consent from the owner, a person is prohibited from selling marketing, offering[,] delivering,

consigning, exchanging, or exposing the variety for sale. In addition, a person is prohibited from soliciting an offer to buy the variety, transfer, or possess it in any manner. It is also illegal to import or export the variety, sexually multiply it, propagate it by tuber, use the variety in producing (as distinguished from developing) a hybrid, or condition the variety for the purpose of propagation.

Does this mean that the home gardener or farmer cannot propagate the seed of a protected variety and save it for future planting?

No. Growers and home gardeners can grow any legally purchased and protected variety they wish. They can collect and save the seed for future planting on their own holdings without violation of the law.

What exemptions are there to the protection provided?

In general, there are two exemptions to the protection provided.

1. A research exemption to allow the use for breeding to develop a new variety; and
2. A farmer's exemption to allow the saving of seed for the sole use of replanting the farmer's land. Neither plant patents nor utility patents provide these exemptions.

How is protection of the variety enforced?

The owner of a protected variety may bring civil action against persons infringing on his or her rights. The owner may ask a court to issue an injunction to prevent others from further violations. It is the owner of the protected variety who must bring suit in such cases. USDA will not take that action. In the USA, intellectual property protection for plants is provided through plant patents, plant variety protection an[d] utility patents. Plant patents provide protection for asexually reproduced (by vegetation) varieties excluding tubers. Plant

variety protection provides protection for sexually (by seed) reproduced varieties including tubers, F_1 hybrids, and essentially derived varieties. Utility patents currently offer protection for any plant type or plant parts. A plant variety can also receive double protection under a utility patent and plant variety protection.

For additional information concerning utility and plant patents please contact the Patent and Trademark Office at Patents and Trademarks, Washington, DC, 20231, or their internet web site at: http://www.uspto.gov. Their web site provides answers to frequently asked questions concerning patents, guides to filing utility and plant patent applications, and access to their database.

Application Requirements

- The name or temporary designation of the new variety;
- Proof that the variety is distinct, uniform and stable;
- The pedigree, breeding methods, and selection criteria used in developing the variety;
- A statement of the basis of ownership and explanation of who, including the breeder, has rights to the variety;
- A sample of at least 2,500 of the untreated viable basic seed required to reproduce the variety, or for a tuber-propagated variety, declaration that a viable cell culture will be deposited in a public depository and will be maintained for the duration of the certificate; and
- Filing and examination fees totaling $2,705 payable when the application is submitted.

Crop Specific Requirements: WHEAT (common wheat, durum wheat, club wheat, spelt, *etc*.)

Milling and Baking Data: The legislative history on Public Law 91-577, which included the Plant Variety Protection Act, bears the following wording:

> *"Therefore, it is the committee's intent that the Secretary shall to the maximum extent practicable, provide information concerning the milling and baking characteristics of wheat. It is also the committee's intent that such information be made available to the public and that it include as many processing and product characteristics as is feasible."*

Such data should be put in the Exhibit D.

Proof: Proof of the distinctness, uniformity, arid stability of the new variety lies with the owner.

Distinctness: The applicant may:

1. List the single variety he or she believes is the one most similar to the new variety and describe how the new variety differs from it;
2. List a group of varieties to which the new variety is similar, and describe how it differs from that group; or,
3. Describe how the variety differs from all other known varieties in the crop kind.

Additionally, the PVP Office maintains databases for crops of both public and private varieties. The examiner uses those and other sources to determine which, if any, varieties are indistinguishable from the new one. If the examiner finds varieties that appear to be indistinguishable from the application variety, the applicant will be notified that supplemental data are necessary. To obtain additional data, applicants may perform additional field or greenhouse replications and may use DNA profiling [and] other analyses to substantiate distinctness. The USDA does not perform tests to confirm distinctness of a variety. That responsibility rests with the applicant.

Uniformity: A statement of uniformity must report the level of variability in any characteristic of the variety. Variation which is predictable, describable, and commercially acceptable may be allowed.

Stability: A statement of genetic stability is required, showing the number of cycles of seed reproduction for which the variety has remained unchanged in all distinguishing characteristics.

Description of Contents of a Complete Application and Exhibit Forms

Note: PVP is working on making forms and guidelines available on this website, however they all are not available. Please contact our office for any forms or guidelines that you do not find on our website.

A PVP application consists of a completed and signed Form SD-470 which includes:

1. Exhibits A, B, C, & E (Exhibit D is optional);
   a) Exhibit A (Breeding History)
   b) Exhibit B (Statement of Distinctness)
   c) Exhibit C (Objective Description)
   d) Exhibit D (Additional descriptive Information)
   e) Exhibit E (Statement of Ownership)
2. A sample of at least 2,500 untreated viable seeds capable of propagating the application variety, for a tuber propagated variety a verification that a viable cell culture will be deposited; and,
3. a check drawn on a U.S. bank for the current fee of $2,705.00 (application and examination fee), payable to "Treasure of the United States".

Form SD-470

The applicant is required to give their name, address, representative, the variety's genus, species, and the variety

name, except that a temporary name will suffice until the certificate is issued. The proposed variety name must also be cleared with the Seed Regulatory and Testing Branch to avoid conflicts with other variety names. The Seed Regulatory and Testing Branch may be contacted at:

U.S. Department of Agriculture
Agricultural Marketing Service
Livestock and Seed Programs
Seed Regulatory and Testing Branch
Building 306, Room 213, BARC-East
Beltsville, Maryland 20705-2325

Or contact their web site at http://www.ams.usda.gov/lsg/seed/ls-sd.htm

In addition, the applicant must complete a statement for the basis of the claim that the variety is new. A variety may be considered new only if propagating or harvested material of the variety has not been sold or otherwise disposed of to other persons for purposes of exploitation of the variety for more than 1 year in the U.S. or 4 years outside of the U.S.

Exhibit A—Breeding History

The applicant is required to provide:

1. A full disclosure of the genealogy back to publicly known varieties, lines, or clones, including the breeding method;
2. The details of subsequent stages of selection and multiplication used to develop the variety;
3. A statement of uniformity reporting the level of variability in any characteristics of the variety (commercially acceptable variability is allowed);
4. A statement of genetic stability showing the number of cycles of seed reproduction for which the variety has remained unchanged in all distinguishing characteristics;

5. The type and frequency of variants observed during reproduction arid multiplication; and

See the Guidelines Exhibit A, Origin and Breeding History.

Exhibit B—Statement of Distinctness (Formally Titled " Novelty Statement")

The applicant is required to give a summary of the variety's distinctness, stating clearly how the application variety may be distinguished from all other varieties in the same crop. If the variety is most similar to one variety or group of varieties, the applicant must:

1. Identify these varieties and state all differences objectively;
2. Attach statistical data for characters expressed numerically and demonstrate that these are clear differences; and
3. Submit, if helpful, seed and plant specimens or photographs (prints) of seed and plant comparisons that clearly indicate distinctness.

See the Guidelines Exhibit B, Statement of Distinctness.

Exhibit C—Objective Description of Variety

The PVP Office has prepared forms for the applicant to provide a botanical description of the variety for most crops. These forms list the botanical characteristics for a kind of crop and the degree of expression of each characteristic. These forms also provide a list of recommended varieties that the applicant should compare to the application variety. The applicant needs to complete the form for his/her variety as thoroughly as possible.

Exhibit D—Optional Supporting Information

The applicant may provide additional information, specimens, and/or materials in support of the claims of the application.

Exhibit E—Statement of Ownership

The applicant is required to furnish a statement for the basis of the applicant's ownership. The PVP Office has prepared a form to simplify this requirement. The form also includes a statement to verify the applicant is eligible to file for PVP in the U.S.

The Plant Variety Protection Act—Federal Regulations

Forms and Instructions

- The Latest Application Form SD-470
- Instruction Page (Available by clicking on Application Form SD-470)
- All Exhibit C Forms
- Exhibit E Form (Available by clicking on Application Form SD-470)
- Guidelines for Exhibit A—Origin and Breeding History
- Guidelines for Exhibit B—Statement of Distinctness

Plant Variety Protection Office Official Journal

Other Links of Interest for PVPO Viewers:

- The Seed Regulatory and Testing Branch
  http://www/ams.usda.gov/lsg/seed/ls-sd. htm
- U.S. Patent and Trademark Office
  http://www.uspto.gov
- Union Internationale Pour La Protection Des Obentions Vegetales
  http://upov.org
- World Seed Industry Organization
  http://worldseed.org
- International Seed Trade Association
  http://seedtest.org
- PVP Application/Certificate Status Database
  http://ww.ars-grin.gov/cgi-bin/npgs/html/pvplist.pl

PVP Crop Description Databases

The PVP crop databases are used to scrutinize the most similar varieties to the application variety and verify the application variety is distinct, These databases contain descriptions of varieties for all PVP applications in the U.S. and the descriptions for all varieties that are publicly known or a matter of common knowledge. A publicly known variety, according to the PVP Act, is "a variety that is adequately described by a publication reasonably considered to be a part of the public technical knowledge in the United States". The PVP Act requires that the description include a disclosure of the principal characteristics by which a variety can be distinguished.

As time permits, the PVP Office is posting a public version of the crop databases. The posted public crop databases do not contain an applicant's description for a variety unless a PVP certificate has been issued for that variety, as they are confidential.

What actions are people prohibited from taking with a protected variety?

Without explicit consent from the owner, a person is prohibited from selling, marketing, offering, delivering, consigning, exchanging, or exposing the variety for sale. In addition, a person is prohibited from soliciting an offer to buy the variety or transfer or possess it in any way. It is also illegal to import or export the variety, sexually multiply it, propagate it by tuber, use the variety in producing (as distinguished from developing) a hybrid, or condition the variety for the purpose of propagation.

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No. Growers and home gardeners can grow any legally purchased protected variety they wish. They can collect and save the seed for their own future planting without violation of the law.

How is protection of the variety enforced?

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Current public crop database in a searchable format:

- Lettuce http://www.ars-grin.gov/dbmugs/~pvpo.html

PVPO News Release

PVPO Current News

Effective September 2000—U.S. Plant Variety Protection Office will suspend training in plant variety protection procedures.

The U.S. Plant Variety Protection Office (PVPO) regrets to announce that the Office will suspend offering training programs in Plant Variety Protection (PVP), or in U.S. procedures for examining PVP applications This decision is necessary to provide continued service to PVP applicants.

Requests to PVPO for training programs are becoming more frequent, as a growing number of countries are enacting Plant Breeders' Rights legislation. However, the cost of offering this training is interruption in service to PVP applicants (the PVPO receives no public funds; it is supported 100% by fees paid by PVP applicants).

It is hoped that training and other outreach programs can be resumed and further developed in future. The PVPO will continued to welcome visitors for periods of up to a half day.

For further information contact:

Dr. Thomas Salt, Chair, Visitor's Committee

Plant Variety Protection Office
10301 Baltimore Avenue, Room 500
Beltsville, MD 20705-2351
Phone: 301-504-5518
FAX: 301-504-5291
E-Mail: thomas.salt at usda.gov

For more information on Plant Variety Protection contact:

Plant Variety Protection Office

10301 Baltimore Avenue, Room 500
Beltsville, MD 20705-2351
Phone: 301-504-5518
FAX: 301-504-5291
E-Mail: *Webmaster. Plant Variety Projection Office*

Send comments or suggestions to:

Plant Variety Protection Office

10301 Baltimore Avenue, Room 500
Beltsville, MD 20705-2351
Phone: 301-504-5518
FAX: 301-504-5291
E-Mail: *Webmaster Plant Variety Protection Office*

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